Supreme Court of the United States

October Term, 1961

No. 242

THE GLIDDEN COMPANY, etc.,
Petitioner,

vs.

OLGA ZDANOK, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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Question Presented

The order allowing certiorari limited the writ to the following question (R. 15):

> "Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?"

Statement of the Case

On February 8, 1961 the United States Court of Appeals for the Second Circuit heard oral argument in the case at bar upon an appeal taken by these respondents from a judgment of the United States District Court for the Southern District of New York, rendered in favor of

petitioner herein. The Court of Appeals consisted of Honorable J. Edward Lumbard, Chief Judge, Honorable J. Warren Madden, Judge of the Court of Claims, sitting by designation and Honorable Sterry R. Waterman, Circuit Judge. The appeal was argued on behalf of both sides.

On March 28, 1961 the Court of Appeals rendered its decision, reversing the judgment of the District Court (R. 13). The opinion of the Court of Appeals was written by Judge Madden. Chief Judge Lumbard dissented in a separate opinion. R. 1-12.

Thereafter, petitioner filed petitions in the Court of Appeals for rehearing and for rehearing *in banc*. The applications were denied in their entirety (R. 14-15).

At no stage of the proceedings in the Court of Appeals —either prior to or at the argument of the appeal, or upon the applications for rehearing and rehearing *in banc*—did petitioner raise any objection to Judge Madden's participation in the case. Petitioner's first challenge to Judge Madden's participation was made in this Court in its petition for a writ of certiorari, where it claimed that the judgment of the Court of Appeals was thereby vitiated (Petition, pp. 18-19).

The assignment of Judge Madden to perform judicial duties in the Court of Appeals, which resulted in his participation in the instant case, was made on January 25, 1961 by the Chief Justice of the United States, acting pursuant to 28 U. S. C. §293 (a).

Judge Madden was appointed as a judge of the Court of Claims by the President with the advice and consent of the Senate, to hold office during good behavior. See 28 U. S. C. §§171, 173. He took office on January 8, 1941 (116 F. 2d, XIII).

Summary of Argument

The judgment of the Court of Appeals is not vitiated by reason of Judge Madden's participation in the hearing and determination of this case, for the following separate and independent reasons:

I

Judge Madden is a duly qualified judge of the Court of Claims, having been appointed by the President and confirmed by the Senate, and he enjoys life tenure. In participating in the hearing and determination of this case in the Court of Appeals, Judge Madden in good faith performed the normal functions of a *de jure* judicial office, pursuant to designation of the Chief Justice of the United States acting in accordance with the applicable statutes. Under the circumstances, Judge Madden acted at least as a *de facto* judge whose exercise of the functions of the office he occupied under the designation was binding unless challenged in a direct proceeding to try his right to participate as a judge in the Court of Appeals. No direct challenge to his title having been made, a judgment in which he participated may not be collaterally attacked, by reason of his participation, for the first time on appeal by the party adversely affected by the judgment.

II

The judgment of the Court of Appeals is not vitiated because of Judge Madden's participation for the additional reason that Judge Madden was at all times an Article III judge and qualified to sit on the Court of Appeals, certainly since 1953 when Congress expressly

declared the Court of Claims to be an Article III court (Act of July 28, 1953, c. 253, §1, 67 Stat. 226). He possessed every incident of office attaching to an Article III judge; he performed judicial duties, enjoyed life tenure, and was entitled to compensation fixed by statute. The 1953 Act represents a surrender by Congress of any power to reduce the tenure or diminish the compensation of the judges of the Court of Claims. Under the circumstances, and irrespective of the constitutional status of the Court of Claims, Judge Madden was an Article III judge, fully competent to participate in the hearing and determination of cases in the Court of Appeals.

III

Reaching the broad constitutional issue here involved, we urge that the participation of Judge Madden in the hearing and determination of this case did not vitiate the judgment of the Court of Appeals, because the Court of Claims, of which Judge Madden is a member, has at all times been, and is now, an inferior court ordained and established by Congress to exercise judicial power under Article III.

The Court of Claims exercises judicial power under Article III in the following instances: (1) cases in law and equity arising under the Constitution and laws of the United States, and (2) controversies to which the United States is a party. Its status as an Article III court is established by analysis of the background, creation and history of the court, which demonstrate the Congressional purpose to constitute it as a court and not as a commission, to give life tenure to its judges, to make its judgments final, to confer concurrent jurisdiction upon the district courts, to bestow appellate jurisdiction on the Court of Claims over certain district court judgments.

Moreover, since the Court of Claims judgments have been established as final, this Court has accepted jurisdiction of appeals from those judgments and, for a continuous period of sixty years up to *Ex parte Bakelite Corporation,* 279 U. S. 438 (1929) and *Williams* v. *United States,* 289 U. S. 553 (1933), it recognized the Court of Claims as an inferior court exercising judicial power under Article III. In the *Williams* case, however, the Court of Claims was held to be a legislative court created by Congress under its power to pay the debts of the United States, and, notwithstanding its jurisdiction of actions to which the United States is a party, it was held not to exercise judicial power under Article III because the doctrine of sovereign immunity from suit rendered the Article III provision, "Controversies to which the United States shall be a Party", inapplicable to suits *against* the United States.

We urge, with respect, that the *Williams* case was wrongly decided, that no constitutional impediment exists to the judicial determination of claims against the United States under Article III where the sovereign has waived its immunity. The basic jurisdiction of the Court of Claims is judicial in its nature and stems from Article III. The 1953 Act, moreover, which expressly "declared" the Court of Claims "to be a court established under article III of the Constitution of the United States", is entitled to great respect in the resolution of the question whether Congress originally established and ordained the Court of Claims as an inferior court under article III. The Act in any case is clearly capable of being given effect from the date of enactment. In either aspect, the Court of Claims was an Article III court at the time this case was heard and determined by the Court of Appeals, hence Judge Madden's participation was in full conformity with law and the judgment of the Court of Appeals could not thereby be adversely affected.

ARGUMENT

I

Judge Madden was at least a *de facto* judge, whose right to participate may not be collaterally attacked by petitioner for the first time on this appeal.

Congress, in establishing courts of appeals as inferior courts under Article III of the Constitution, has prescribed that each Court of Appeals shall consist of the circuit judges of the circuit in active service, and further, that the Circuit Justice and "justices or judges designated or assigned shall also be competent to sit as judges of the court." 28 U. S. C. §43(b). The assignment statute here involved, 28 U. S. C. §293(a), provides that the "Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims * * * to perform judicial duties in any circuit * * * in a court of appeals * * *."[1] A judge of the Court of Claims so designated shall discharge all "judicial duties" for which he is assigned and may be required to perform any duty which might be required of a judge of the court to which he is assigned; indeed, a judge acting under a designation "shall have all the powers of a judge of the court * * * to which he is designated and assigned", with exceptions not relevant here. 28 U. S. C. §296.

Cases in the Court of Appeals, other than *in banc* proceedings, are to be heard and determined by a court or

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[1] A judge of the court of claims is a "judge of the United States" within the provisions of the Judicial Code, as is a judge of the court of appeals. 28 U. S. C. §451. Judges of both courts take the same oath of office, 28 U. S. C. §453, are subject to disqualification under the same circumstances, 28 U. S. C. §455, are barred from engaging in the practice of law, 28 U. S. C. §454, may resign or retire under the same conditions, 28 U. S. C. §§371, 372.

division of not more than three judges, of whom a majority constitute a quorum. 28 U. S. C. §46.

The Court of Appeals which heard and determined the appeal in the instant case was composed of the Chief Judge of the circuit, a Circuit Judge, and a Judge of the Court of Claims designated by the Chief Justice, as provided by statute, to perform judicial duties in the circuit. The sole issue here is whether the judgment rendered by the Court of Appeals, so constituted, is void.

At the threshold, we note that no question is raised by petitioner as to Judge Madden's judicial capacity, *i.e.*, his power to act in a judicial capacity in the Court of Claims. He was appointed to that court in 1941 by the President by and with the advice and consent of the Senate, to hold office during good behavior,[2] and he was in active judicial service at the time of his designation.

In authorizing the temporary assignment of judges of the Court of Claims to perform judicial duties in the Court of Appeals, Congress was acting well within its power to constitute tribunals inferior to the Supreme Court. U. S. Const., Art. I, sec. 8, cl. 9; Art. III, sec. 1. In *Lamar* v. *United States*, 241 U. S. 103 (1916), where a district judge in one circuit was assigned to perform judicial duties in a district in another circuit, in conformity with applicable statutory provisions, it was contended that the assignment constituted an infringement of the power of appointment and confirmation of judges vested by the Constitution in the President and Senate. This Court declared (241 U. S. at p. 118) that merely to state the contention "suffices to demonstrate its absolute unsoundness." The fact that in the instant case the as-

[2] Identical provisions govern the appointment and tenure of circuit judges. 28 U. S. C. §44.

signment was of a Court of Claims judge rather than a district judge is not material, because the common source of authority is the power of Congress to constitute inferior courts—in this instance, the Court of Appeals. Further, there is no question in this case but that the statutory procedures governing the assignment were fulfilled in literal detail.

There was in every respect, therefore, full compliance with all constitutional and statutory requirements for the establishment and formation of the Court of Appeals which heard and determined the appeal in the instant case. That court possessed and exercised jurisdiction over the subject matter of the case and over the parties. Accordingly, no vice of any kind attached to the judgment rendered by it.

Even if doubt existed concerning the validity of the assignment here involved, it is plain that in performing judicial functions in the Court of Appeals, Judge Madden acted at least as a *de facto* judge. It will be noted that as a judge of the Court of Claims his appointment and tenure were identical with those of circuit judges; his assignment to the Court of Appeals was authorized by an Act of Congress; his designation by the Chief Justice to perform judicial duties in the Court of Appeals was in conformity with the statute; he occupied a *de jure* judicial office in good faith; and he performed the judicial duties pertaining to that office. At no stage of the proceedings in the Court of Appeals did petitioner object to Judge Madden's participation in the hearing and determination of the appeal by that court. His participation therein cannot at this time be assailed collaterally by petitioner, by attacking the validity of the judgment rendered by the court.

In *McDowell* v. *United States*, 159 U. S. 596 (1895), which involved the power of a circuit judge to designate a district judge from one district to sit in another district, this Court said (at pp. 601-602):

> "Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment, regular on its face; and the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public."

The acts of *de facto* officers are held valid upon considerations of policy and necessity—to avoid the "endless confusion" which would result if in any proceeding before a *de facto* officer his title to office could be questioned collaterally. *Norton* v. *Shelby County*, 118 U. S. 425 (1886). In that case the Court said (at pp. 441-442):

> "Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined."

See also:

Ball v. *United States*, 140 U. S. 118 (1891);
Wright v. *United States*, 158 U. S. 232 (1895);
Starr v. *United States*, 164 U. S. 627 (1897);

Sylvia Lake Co. v. *Northern Ore Co.*, 242 N. Y. 144, 147-148 (1926), cert. den. 273 U. S. 695 (1926).

In *Johnson* v. *Manhattan Ry. Co.*, 61 F. 2d 934 (2d Cir. 1932), aff'd 289 U. S. 479 (1933), the Circuit Court of Appeals for the Second Circuit said concerning this question (per L. Hand, J., at p. 938):

> "* * * not all errors go so far to the root as to make the whole proceeding a complete nullity; else the trouble and expense of litigation would go for nothing and controversy never end. Therefore, the law will not scrutinize too nicely a judge's warrant of authority; he may indeed have so little color of office as to stand like a mere interloper, but that is not ordinarily true, if, being duly qualified as a judge, some effort has been made to conform with the formal conditions on which his particular powers depend."

Any challenge to Judge Madden's right to perform judicial functions in the Court of Appeals should have been made in a direct proceeding for that purpose in the nature of *quo warranto* to try his right to the position. The validity of his designation and his participation in the hearing and determination of this case may not be challenged for the first time on appeal from an adverse judgment. *Lamar* v. *United States*, 241 U. S. 103, 117-118 (1916); *United States* v. *Marachowsky*, 213 F. 2d 235 (7th Cir. 1954), cert. den. 348 U. S. 826 (1954).[3]

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[3] Cases cited by petitioner for the proposition that the Court of Appeals "did not have the function or the power to hear and determine the appeal" in the instant case by reason of Judge Madden's participation (Pet. Br., p. 23), lend no support to that proposition. *United States* v. *American-Foreign Steamship Corp.*, 363 U. S. 685 (1960) and *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (1947) differ from the case at bar because in those cases there was no *de jure*

II

Judge Madden is an Article III judge, and has been so at least since 1953, competent to sit on the Court of Appeals.

Apart from any question as to the constitutional status of the Court of Claims, it is our position that Judge Madden was an Article III judge competent to sit on the Court of Appeals and to participate in the hearing and determination of this case. Under Article III a judge (1) performs judicial functions; (2) holds office during good behavior; and (3) receives compensation which cannot be diminished during his continuance in office. Judge Madden possessed all of those qualifications at the time of his participation in this case.

First, Judge Madden performed judicial duties. 28 U. S. C. §1491, cf. 28 *id.* §§1331, 1346.

Second, he enjoyed life tenure. 28 U. S. C. §173.

Third, he received compensation, the amount of which may not be diminished during his continuance in office. 28 U. S. C. §§171, 173.

Although the compensation of a judge of the Court of Claims was held subject to reduction in *Williams* v. *United States*, 289 U. S. 553 (1933), the Act of July 28, 1953, c. 253, §1, 67 Stat. 226, amended §171 of Title 28 of the United States Code by adding the provision that the Court of Claims

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office or court could be said to exist which might be occupied by a *de facto* officer. *Frad* v. *Kelly*, 302 U. S. 312 (1937) did not involve a *de facto* officer because the judge did not assume to fill a *de jure* office. *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893) made no determination on the merits as to the validity of a decree participated in by a judge assertedly incompetent under statute.

> "is hereby declared to be a court established under article III of the Constitution of the United States."

The House Judiciary Committee, in recommending passage of H. R. 1070, 83rd Cong. 1st Sess. (H. Report 695), which later became the 1953 Act, declared that, among its purposes

> "this measure * * * will protect the independence of the bench of the Court of Claims * * * "

and the committee reiterated in the conclusion of the report that the bill should

> "assure the independence of the Court of Claims judiciary * * *."

The 1953 Act, therefore, in terms and read in light of its background represents a renunciation by Congress of whatever right it may have had to reduce the compensation of judges of the Court of Claims.

Judge Madden enjoys, therefore, the same judicial independence as is possessed by judges of Article III courts, and which it was the purpose of that Article to insure. He was fully competent to participate in the hearing and determination of this case in the Court of Appeals.

No persuasive reason is suggested why a judge so qualified cannot perform judicial duties in an Article III court, even though he may also sit on a court deemed to be legislative in nature. The performance of Article III judicial functions by judges in District of Columbia courts, which also possess administrative and legislative powers under Article I, has been upheld. *O'Donoghue* v. *United States,* 289 U. S. 516, 545-548 (1933). And this

Court has regularly reviewed determinations of courts thought to be legislative tribunals. *Ex parte Bakelite Corporation,* 279 U. S. 438 (1929); *Williams* v. *United States,* 289 U. S. 553 (1933); *Pope* v. *United States,* 323 U. S. 1, 13-14 (1944).

III

The Court of Claims has exercised judicial power under Article III from earliest days.

We have urged that, irrespective of the constitutional status of the Court of Claims, the judgment of the Court of Appeals in which Judge Madden participated should stand, because:

(a) the Court of Appeals was a properly constituted inferior court and Judge Madden participated therein as a *de facto* judge (Point I);

(b) Judge Madden was an Article III judge competent to participate in the hearing and determination of this case (Point II).

In addition, it is our position that the Court of Claims was in fact ordained and established by Congress as an inferior court to exercise judicial power under Article III, and, at least since the passage of the 1953 Act which declared the court to have been so created, its status as an Article III court is not open to serious question. The decision in *Williams* v. *United States,* 289 U. S. 553 (1933), holding the Court of Claims to be a legislative court, contrary to earlier views expressed by this Court, was in error, we submit, and should be re-examined.

That the Court of Claims is and at all times has been an Article III court, we propose to show by a review

of its background and history, as well as by the legislative purpose underlying its establishment and the functions exercised by the court.

1. Background and creation of the Court of Claims.

The court was established by Congress in 1855 (10 Stat. 612). Although up to that time claims against the United States had been presented to Congress for consideration, early authorities did not regard those matters as falling within the exclusive province of Congress; indeed, it was assumed that the inferior courts could exercise jurisdiction if their decisions were not subject to administrative revision.

See:

Hayburn's Case, 2 Dall. 409 (1792);
United States v. *Ferreira,* 13 How. 40 (1851).

In enacting the bill which established the Court of Claims, Congress evidently held the view that it was establishing an inferior federal court to exercise judicial power under Article III. The original bill which culminated in the 1855 statute proposed the creation of a commission, the members of which were to hold office at the pleasure of the President. By amendment, however, the measure was changed to provide for a "Court of Claims" consisting of three judges who were to hold office during good behavior. The debates provoked the expression of varying opinions as to the nature of the body to be created, particularly since its decisions were not final but were to be reported to Congress. Cong. Globe, 33rd Cong., 2d Sess., pp. 70 *et seq.* The bill, however, was finally adopted in its amended form. In the course of the debates, it is interesting to note that Senator Chase, later a member of this Court when it decided

Gordon v. *United States*, 2 Wall. 561 (1865),[4] expressed the view that "judicial authority" was not being conferred upon the tribunal for the reason that "[j]udicial authority implies power to determine finally upon cases submitted to it" (*id.* at p. 112)—not because the subject matter of the court's jurisdiction consisted of claims against the United States. And, although the legislative court concept had been recognized since *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), in which it had been declared that territorial courts were created under Article I and "incapable of receiving" judicial power under Article III, the debates gave no consideration to the establishment of the new tribunal as an Article I court. It was universally assumed that the Court of Claims would not be inherently precluded from enjoying the status of an Article III court by reason of the fact that its jurisdiction consisted of claims against the United States. Cong. Globe, 33rd Cong., 2d Sess., pp. 71, 72, 107, 108-109, 111, 113, 114.

2. Finality of the court's judgments.

Within a brief period after establishment of the court, it became evident that the power of Congressional revision of the court's judgments was hampering the disposition of claims. In 1861 President Lincoln recommended that Congress provide that the court's decisions be made final, saying:

> "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department; * * *. It was intended by the organization

[4] See p. 16, *infra*.

> of the Court of Claims mainly to remove this branch of business from the Halls of Congress; * * *." (Cong. Globe, Dec. 3, 1861, p. 2, Appendix; 37th Cong., 2d Sess.)

In 1863 Congress enacted a statute to make final the judgments of the court and to provide for appeals therefrom to this Court. 12 Stat. 765. However, the new law also prohibited the payment of adjudicated claims from treasury funds until an appropriation for such claims had been estimated by the Secretary of the Treasury. By reason of this provision, in effect prescribing administrative review of the court's adjudications, an appeal to this Court from a judgment of the Court of Claims was dismissed shortly afterward, for want of jurisdiction, in *Gordon* v. *United States,* 2 Wall. 561 (1865); opinion by Mr. Chief Justice Taney reported 117 U. S. 697 (1865).

The following year Congress repealed the objectionable provision for administrative review (Act of March 17, 1866, 14 Stat. 9), and this Court thereafter took jurisdiction of appeals from judgments of the Court of Claims. *DeGroot* v. *United States,* 5 Wall. 419 (1867); *United States* v. *Jones,* 119 U. S. 477 (1886).

It will be noted that in the *Gordon* case Chief Justice Taney stated that this Court "cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States". 117 U. S., at p. 704. It would therefore seem clear that when the judgments of the Court of Claims became final determinations, no obstacle remained to recognition of the court as one exercising judicial power under Article III.

3. Subsequent history concerning the court's status.

For an unbroken period of sixty years thereafter, up to 1929, this court uniformly assumed that the Court of Claims was an Article III court.

In *United States* v. *Klein,* 13 Wall. 128, 144-145 (1871), Chief Justice Chase stated that the "Court of Claims is thus constituted one of those inferior courts which Congress authorized * * *."

In *United States* v. *Union Pacific R. Co.,* 98 U. S. 569, 603 (1879), the Court said:

> "Congress has under this authority [Article III], created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution."

See also: *United States* v. *Louisiana,* 123 U. S. 32 (1887); *Minnesota* v. *Hitchcock,* 185 U. S. 373, 384, 386 (1902); *Kansas* v. *United States,* 204 U. S. 331, 342 (1907); *Miles* v. *Graham,* 268 U. S. 501 (1925). In the last mentioned case, the Court held that Article III, Section 1 of the Constitution forbids the imposition of a federal income tax upon the compensation of a judge of the Court of Claims.

During this sixty-year period Congress, too, in adopting the Tucker Act, Act of March 3, 1887, 24 Stat. 505,[5] indicated that the Court of Claims was "a judicial and not a legislative tribunal". H. Rept. 1077, 49th Cong., 1st Sess., pp. 4, 5.

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[5] The Act, among other things, re-enacted the jurisdiction of the Court of Claims and gave concurrent jurisdiction to the federal district courts over the same claims (up to $10,000).

And in 1953, Congress passed the Act which states explicitly that the Court of Claims is "declared" to be—not thereby established as—an Article III court. Act of July 28, 1953, c. 253, §1, 67 Stat. 226. In short, the purpose of the Act was to confirm what the character of the court was from its beginnings, and not to change its nature from a legislative court to an Article III court.

This is evident not only from the language of the statute, but also from its legislative history. The bill which became the Act, H. R. 1070, 83rd Congress, 1st Sess., was favorably reported by the House Judiciary Committee, which stated (H. Rept. 695):

> "By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient."

The report stated further:

> "It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under Article III."

We recognize that the subsequent expression of views by Congress may not be conclusive as to the earlier intent, but we submit that it merits at least "great respect". *United States* v. *Clafin*, 97 U. S. 546, 548 (1878).

Congress saw the necessity for the 1953 Act because of this Court's departure from the series of cases between

DeGroot v. *United States* and *Miles* v. *Graham*, discussed above, to state by way of dictum in *Ex parte Bakelite Corporation*, 279 U. S. 438 (1929), and to hold in *Williams* v. *United States*, 289 U. S. 553 (1933), that the Court of Claims is a legislative court created by Congress as an incident of its power to pay the debts of the United States (Art. I, Sec. 8, cl. 1).[6]

4. The Williams and Bakelite cases.

In *Williams* the Court, in holding the Court of Claims to be a legislative court, confirmed the views previously expressed by it in *Bakelite*, where it had declared that although claims against the United States are susceptible of determination by courts, they nevertheless "admit of legislative or executive determination". *Ex parte Bakelite Corporation*, 279 U. S. at p. 452. We believe that this view lacks valid basis (see pp. 22-23, *infra*).

This Court further declared in *Williams* that the Court of Claims undoubtedly exercises judicial power, but not judicial power as defined by Article III. It cited in support *Gordon* v. *United States*, 117 U. S. 697 (1865), discussed above, and *In re Sanborn*, 148 U. S. 222 (1893), which denied an appeal to this Court from an opinion rendered to an administrative officer by the Court of Claims. We believe that *Gordon* became ineffective when the Court of Claims' judgments were made final (p. 16, *supra*), and that the effect of *Sanborn* is to prohibit the exercise of non-judicial functions by this Court. In our

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[6] Thomas Jefferson held the view that the words "to pay the Debts" did not carry an independent grant of power, but merely qualified the taxing power conferred by Art. I, sec. 8, cl. 1. In his Opinion on the Bank he wrote: " * * * the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They [Congress] are not to lay taxes *ad libitum for any purpose they please; but only to pay the debts or provide for the welfare of the Union.*" Writings of Thomas Jefferson, v. III, pp. 147-149 (Library Edition, 1904).

view, therefore, neither case furnishes support for the conclusion reached in *Bakelite* and *Williams* that the Court of Claims does not exercise judicial power under Article III.

Finally, the Court held in *Williams,* that Article III does not apply to controversies to which the United States is a party defendant. We believe that this conclusion is not justified either by the language or the background of the constitutional provision (see pp. 26-27, *infra*).

5. The court's judicial functions under Article III.

In essence, "judicial power" means the right to pronounce final determinations of actual controversies. *Muskrat* v. *United States,* 219 U. S. 346, 356 (1911). This right the Court of Claims unquestionably possesses, as we have seen, subject to appellate review.

Under Article III, Section 2, the judicial power extends, *inter alia,* to:

> (1) All cases in law and equity arising under the Constitution and laws of the United States.
>
> (2) Controversies to which the United States shall be a party.

As we shall see, the Court of Claims exercises judicial power under both headings. First, however, we propose to review the pertinent statutory provisions governing the organization and jurisdiction of the court.

(a) Statutory provisions.

The Court of Claims is a court of record constituted of a chief judge and four associate judges who are appointed by the President by and with the consent of the Senate. 28 U. S. C. §171. The members of the court hold office during good behavior, and their compensation is

fixed by law. *Id.*, §173.[7] The judges may resign or retire from office under the same conditions as circuit judges and district judges. *Id.*, §§371, 372, 451.

The court is a "court of the United States"[8] within the provisions of the Judicial Code. *Id.*, §451. A judge of the court is required to take the statutory oath of office, he may not engage in the practice of law, he must disqualify himself under prescribed circumstances. *Id.*, §§453-455.

The Code provides for the appointment of a clerk, commissioners, reporter-commissioners, stenographers, clerical employees, a bailiff and a messenger. *Id.*, §§791-795.

The general jurisdiction of the Court of Claims is set forth in 28 U. S. C. §1491. Under that provision the court may render judgment upon any claim against the United States

> "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[9]

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[7] The compensation of judges of the Court of Claims is the same as that of circuit judges, 28 U. S. C. §44(d), and exceeds that of district judges, *id.*, §135.

[8] The term also embraces this Court, courts of appeals, district courts, and any court created by an act of Congress, the judges of which hold office during good behavior.

[9] The district courts have original jurisdiction, concurrent with the Court of Claims, *inter alia*, of claims against the United States up to $10,000 in amount,

> "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort." 28 U. S. C. §1346 (a).

The jurisdiction of the Court of Claims also includes subject matters specifically mentioned by law: accounts of officers, etc.; damages for unjust conviction, patent cases, and so on. *Id.*, §§1494-1498. Congressional reference cases are provided for in §1492. Jurisdiction is expressly withheld in pension and treaty cases. *Id.*, §§1501-1502.

The court may render judgment upon set-off or demand in favor of the United States. *Id.*, §1503. It also has appellate jurisdiction to review final judgments of the district courts, in certain cases. *Id.*, §§1504, 2110. A case mistakenly filed in the Court of Claims may be transferred to the district court, where it proceeds as if it had been filed in that court. *Id.*, §1506.

Cases from the Court of Claims are reviewable by this Court on certiorari or certified questions. *Id.*, §1255.

The procedure applicable in the Court of Claims is set forth in 28 U. S. C. §§2501-2520. Section 2519 provides:

> "A final judgment of the Court of Claims against any plaintiff shall forever bar any further claim, suit or demand against the United States arising out of the matters involved in the case or controversy."

(b) The court's Article III judicial functions extend to claims against the United States.

In *Bakelite* and *Williams* this Court stated that claims against the United States are susceptible of but do not necessarily or inherently require judicial determination, therefore the Court of Claims which is vested with jurisdiction over such claims does not exercise Article III judicial power. We respectfully submit that the position taken by the Court is in error.

Under the Constitution, Congress is authorized to ordain and establish inferior courts to exercise judicial power,

as that term is defined in Article III. There is no constitutional inhibition, explicit or implicit, against bringing under the jurisdiction of inferior courts for judicial determination, within the ambit of Article III, a subject matter which is also capable of being resolved in a legistive or administrative procedure. This is a matter entrusted to the will of Congress, and where Congress has acted to place the subject within the sphere of the judicial power for determination, such action is a valid exercise of its constitutiona. authority. As this Court said in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1856):

> "* * * there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

See also, *Fong Yue Ting* v. *United States*, 149 U. S. 698, 715 (1893); *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582 (1949).

Congress, therefore, is authorized to bring within the cognizance of the Court of Claims, for final determination by it, claims against the United States which comprise cases arising under the Constitution and laws of the United States and controversies to which the United States is a party, and the Court of Claims established as a forum for the determination of those claims, exercises judicial power under Article III—no less, we submit, than do the district courts in the determination of the same cases and controversies committed to their jurisdiction under 28 U. S. C. §1346 (a).

(c) The court's basic and primary judicial functions are not affected by other powers.

The fact that a part of the jurisdiction of the court involves Congressional reference cases (28 U. S. C. §1492) does not impair the primary jurisdiction of the court as above set forth, which is judicial in nature. A court may exercise Article III judicial powers and non-judicial powers. *O'Donoghue* v. *United States,* 289 U. S. 516 (1933). In *O'Donoghue,* the District of Columbia superior courts were held to be Article III courts, notwithstanding that they possessed non-judicial jurisdiction based on Congress' plenary power over the District under Article I, Sec. 8, cl. 17.

No reason is evident why, in principle, the same rule cannot be held to apply to the Court of Claims. The plenary power of Congress "to pay the Debts * * * of the United States", conferred by Article I, would justify Congress in establishing a procedure to assist in achieving that end through the medium of the court, but that fact does not serve to destroy the fundamental nature of the judicial power otherwise exercised by the court under Article III. As was said in the *O'Donoghue* case, 289 U. S. 516, at page 546, the dual powers of Congress under Article I and Article III are not incompatible and there is "no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District".

Unlike the transitory or provisional territorial courts which are at the basis of the legislative court doctrine, the Court of Claims was established and has functioned as an integral and permanent part of the federal judicial system, possessing a specialized jurisdiction, and it is in every essential aspect a constitutional court exercising

judicial power under Article III.[10] Indeed, in *Pope* v. *United States,* 323 U. S. 1 (1944), this Court, although it did not consider what effect the non-judicial duties of the Court of Claims had on that court's constitutional status, said (at pp. 13-14):

> "It is enough that, although the Court of Claims, like the courts of the District of Columbia, exercises non-judicial duties, Congress has also authorized it as an inferior court to perform judicial functions whose exercise is reviewable here. The problem presented here is no different than if Congress had given a like direction to any district court to be followed as in other Tucker Act cases."

(d) The court performs judicial functions in cases arising under the Constitution and laws of the United States.

The matters entrusted to the general jurisdiction of the Court of Claims include claims against the United States arising under the Constitution and laws of the United States. 28 U. S. C. §1491, p. 21, *supra.* Such claims have a federal origin; their subject matter is essentially federal in nature; they must be authorized by federal act; they are pursued in federal courts. Those claims require a determination of federal questions under the Constitution or acts of Congress and are, we submit, cases arising under the Constitution and laws of the United States within the judicial power defined in Article

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[10] Other courts of specialized jurisdiction were the Emergency Court of Appeals created by the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 31-33, with jurisdiction to review orders of the Price Administrator, and composed of circuit judges and district judges designated by the Chief Justice, and the Commerce Court created by the Mann-Elkins Act of 1910, 36 Stat. 539, with jurisdiction to review orders of the Interstate Commerce Commission, and composed of circuit judges to be designated by the Chief Justice. The Commerce Court was abolished by the Act of October 22, 1913, 38 Stat. 208, 219.

III. See *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582 at 611-615, 641-642, 643, 649 (1949); *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 455 (1899).

(e) The court performs judicial functions in controversies to which the United States is a party.

Since the United States is a party to all controversies in the Court of Claims, the judicial power under Article III would normally be thought to extend to the determination of those controversies. Indeed, this Court in the past had expressly so declared. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 384, 386 (1902); *Kansas* v. *United States*, 204 U. S. 331, 342 (1907). In *Williams*, however, the Court rejected its views so expressed, and stated that the provision of Article III in question was actually meant to refer only to controversies to which the United States is a party plaintiff, for the sovereign is immune from suit. *Williams* v. *United States*, 289 U. S. 553, 572-579 (1933).

We submit, however, that the practice of waiver of sovereign immunity and consent to be sued had evolved long before the framing of the Constitution and the existence of the practice was well-known to the framers. The Federalist, No. 81 (Hamilton); *Monaco* v. *Mississippi*, 292 U. S. 313, 323-324 (1934). Thus, the extension of judicial power under Article III to controversies to which the United States is a "party" would seem rather to manifest an intention that such power shall apply not only to matters in which the United States is party plaintiff, but also to controversies where it is party defendant by reason of having waived immunity, as was stated by the Court in *Minnesota* v. *Hitchcock, supra*, and *Kansas* v. *United States, supra.*

The reliance of *Williams* upon the omission from this clause of the word "all" which is mentioned in some

other categories of cases to which the judicial power extends is not, in our view, conclusive of intent. It was pointed out in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 334-335, 336 (1816), that the omission of the word indicated that the judicial power was not to be extended "imperatively" to cases where it would be better for the power to be exercised only as Congress "in their wisdom" might determine, and left it open to Congress "to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate".

Moreover, the fact that the Judiciary Act of 1789 conferred jurisdiction on the circuit courts in cases where the United States is plaintiff is not persuasive as to the scope of Article III. This is indicated by the Act itself, in the fact that jurisdiction was not conferred where the matter in dispute amounted to $500 or less, although of course, Article III does not contain such a limitation. It cannot be assumed, therefore, that the Act precisely reflected the types of cases and controversies to which the judicial power under Article III extends.

The language of the provision extending the judicial power to controversies to which the United States is a party is unconditional, and examination of its background fails to demonstrate that its scope is in any respect limited so as to exclude controversies to which the United States is a party defendant.

6. Since the 1953 Act, the court's status as an Article III court has been unquestionable.

Article III provides that Congress may, from time to time, ordain and establish inferior courts to exercise the judicial power defined in that Article. By the 1953 Act, Congress, among other things, amended 28 U. S. C. §171 so as to add the following provision:

> "Such court [*i. e.*, the Court of Claims] is hereby declared to be a court established under article III of the Constitution of the United States."

The report of the House Judiciary Committee recommending passage of H. R. 1070, which became the Act, is explicit in setting forth the purposes of the bill. H. Rept. 695, 83d Congress, 1st Sess. The report declares:

> "The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court, the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient."

The report states further:

> "Congress was possessed of two powers under which it might have created the Court of Claims, and it would seem appropriate for it to say which of the powers it was intending to exercise. * * *"

> "It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under Article III."

After reviewing the cases which dealt with the status of the Court of Claims, the report continues:

> "In view of this uncertainty and difference of opinion it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power."

We are aware that *Ex parte Bakelite Corporation,* 279 U. S. 438, 459 (1929), indicates that the constitutional status of a court does not depend on the intention of Congress, but "the true test lies in the power under which the court was created and in the jurisdiction conferred."

We respectfully suggest, however, that if this is indeed the applicable test, some investigation into the intent of Congress in establishing a court is not without relevance. When Congress acts, *i.e.,* exercises a power, assuredly its purpose or intent merits inquiry. In the consideration of the bill which became the 1953 Act, Congress knew that a question existed as to whether it had exercised Article I or Article III power in the creation of the Court of Claims, and it declared its purpose that the court was ordained and established as an Article III court. We submit that the express statutory declaration was effectual to fix the status of the court from its beginnings, and, at the least, from the time of the Act. If a declaratory act is inoperative on the past, it may nevertheless act on the future. *Postmaster-General* v. *Early,* 12 Wheat. 136, 148-149 (1827).

The status of the Court of Claims as an Article III court has been settled, therefore, at least since 1953, and

the court possessed that status when Judge Madden participated in the hearing and determination of this case. Judge Madden's status at that time was that of a judge of an Article III court. Although he took office in 1941, it will be noted that in conformity with the provisions of Article III he was appointed by the President by and with the advice and consent of the Senate, and that at all times during his continuance in office he enjoyed life tenure. The 1953 Act did not abolish his office or create a new one. There was no necessity that he should again be nominated and appointed. *Shoemaker* v. *United States*, 147 U. S. 282, 301 (1893).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

December 26, 1961.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 142

THE GLIDDEN COMPANY, ETC.,

Petitioner,

v.

OLGA ZDANOK, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TEN SECOND CIRCUIT

BRIEF FOR MARVIN JONES, CHIEF JUDGE OF THE UNITED STATES COURT OF CLAIMS, AND SAMUEL S. WHITAKER, DON E. LARAMORE, JAMES L. DURFEE, BENJAMIN H. LITTLETON AND J. WARREN MADDEN, JUDGES OF THE UNITED STATES COURT OF CLAIMS, AS AMICI CURIAE

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